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JURISDICTIONAL STATEMENT

This is an appeal from the Division I, Circuit Court of Cape Girardeau County, Missouri, of the trial court=s JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION OF MARRIAGE entered on January 29, 2004. A MOTION TO VACATE, SET ASIDE, REOPEN, AMEND JUDGMENT; OR, GRANT NEW TRIAL was filed on February 17, 2004, and denied on March 1, 2004. A NOTICE OF APPEAL was filed on March 9, 2004. This is an appeal challenging the trial court=s order on subject matter jurisdiction and, also that the court abused its discretion in failure to grant a motion to vacate its JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION OF MARRIAGE. This appeal involves no issue which would vest exclusive jurisdiction in the Missouri Supreme Court. Jurisdiction for this Appeal is conveyed upon the Court of Appeals, Eastern District by Article V, ' 3, of the Missouri Constitution.

STATEMENT OF FACTS

Background

The parties were divorced on May 20, 1994. [LF 9] There was one child born of the marriage, namely: Brett Alexander Meyer, born July 3, 1992. [LF 10] The Decree of Dissolution of Marriage granted the parties joint legal custody of the child; however, Mother was awarded primary physical custody. [LF 12] Father was awarded limited and non-specific visitation. [LF 13]

In October of 1996, Mother and the child moved to Tucson, Arizona, where they continue to reside. [LF 84, TR 9-10] At the time of the divorce, Father was on active duty with the United States Armed Forces. [TR 7] During his tenure with the military, Father has been stationed at various posts outside the State of Missouri, including Georgia, Nevada, Texas, Alabama and Italy. [TR 8, 10, 11, 12]

On February 19, 2003, Father filed a MOTION FOR MODIFICATION. [LF 5] Without any notice of hearing, this matter was taken up by the trial court on June 3, 2003. [LF 5]

On June 3, 2003, the trial court entered a JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION OF MARRIAGE. [LF 27] Pursuant to said Judgment, the parties were awarded joint legal and joint physical custody of the minor child. [LF 31] Father was awarded specific periods of visitation. [LF 33] This JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION OF MARRIAGE was entered without any notice to Mother.

Facts leading up to the current Judgment

Four months later, on October 23, 2003, Father filed yet another MOTION FOR MODIFICATION. This time, Father requested sole legal and physical custody of the parties= one

unemancipated minor child. [LF 38] Mother was personally served with a copy of said MOTION FOR MODIFICATION on November 10, 2003. [LF 6]

No other custody proceeding was pending at the time this action was filed on October 23, 2003. [LF 39-40] Therefore, the court in Arizona, which was the child=s "home state" had not declined jurisdiction when this action was commenced.

On November 19, 2003, Father filed a PETITION FOR ORDER TO SHOW CAUSE in the Superior Court of the State of Arizona, County of Pima, to enforce his Christmas, 2003, visitation. [LF 51, 97] On December 8, 2003, Mother filed a MOTION FOR ASSUMPTION OF JURISDICTION in the Superior Court of the State of Arizona, County of Pima. [LF 52] On December 10, 2003, the Superior Court of Arizona, County of Pima, denied Mother=s MOTION FOR ASSUMPTION OF JURISDICTION without any specific findings or comment. [LF 52]

On December, 8, 2003, Mother sent a letter to the judge requesting that she be granted a MOTION FOR EXTENSION OF TIME in order to respond to the MOTION FOR MODIFICATION. [LF 6, 85] Despite repeated calls by Mother, no ruling was initially made on this extension of time. [LF 46] On December 16, 2003, Mother telephoned the court clerk to determine if the judge was going to grant her request for extension of time. [LF 46] The clerk promptly made a hand-written note to the judge asking that her request be ruled upon. [LF 46] On December 17, the judge denied Mother=s request for an extension of time. [LF 6, 46] The court clerk did not mail out a copy of the docket sheet denying Mother=s MOTION FOR EXTENSION OF TIME until December 19, 2004. [LF 6]

On December 23, 2003, Father=s attorney filed a NOTICE OF HEARING to take up the MOTION FOR MODIFICATION filed on behalf of Father. [LF 6-7, 47] The Notice scheduled a

hearing date of January 6, 2004. [LF 7, 47] A previous court date of January 12, 2003, had been canceled in lieu of the earlier date. [LF 7]

Mother received the NOTICE OF HEARING on December 26, 2003. This was the first time that Mother was aware that a hearing was scheduled. [LF 86] This gave Mother just eleven (11) days notice prior to the hearing date.

Mother did not have the financial resources to hire an attorney or travel from Arizona to Missouri on such short notice. [LF 86] Mother was not able to take off work for the court appearance without jeopardizing her employment. [LF 86]

On December 26, 2003, Mother contacted the court clerk by telephone and was advised for the first time that her request for extension of time had been denied. [LF 86] On January 1, 2004, and January 5, 2004, Mother wrote the Court a letter explaining the fact that she could not travel on such short notice and requesting additional time in which to defend this action. [LF 86, TR 3] This material was received by the court before the hearing commenced on January 6, 2004. [TR 3] The court denied Mother=s request for continuance. The trial court did not notify Mother that her request for continuance was denied. [TR 3]

On January 6, 2004, the trial court took evidence and proceeded against Petitioner. [LF 7] Father was the only party present to testify at the hearing. [LF 49] The trial court took the matter under advisement pending the submission of a formal judgment by the attorney for Father. [LF 7, 38]

The trial judge indicated that he was going to award custody to father. [TR 34-35] Father indicated that he did not actually plan to take custody of his child until the summer of 2004. [TR 33- 34]

Sometime after the hearing, Father=s attorney provided the Court with a JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION OF MARRIAGE. No copy of this Order was

provided to Mother in advance. She had no opportunity to review the Order, make objections or comments regarding the substance or form of said Order. [LF 86]

On January 29, 2004, the judge signed the JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION OF MARRIAGE. [LF 57] On February 6, 2004, a second PARENTING PLAN was filed with the trial court by Father=s attorney. [LF 7] However a copy of this second PARENTING PLAN was not provided to Mother for her comment, objection or input. [LF 86-87] It is unclear whether this second PARENTING PLAN has been incorporated into any Judgment of Order of this Court.

On February 17, 2004, Mother filed her MOTION TO VACATE, SET ASIDE, REOPEN AND AMEND JUDGMENT; OR, GRANT NEW TRIAL. [LF 7, 71] Mother=s post-trial motion was scheduled for February 23, 2004. However, Father=s counsel asked for a continuance which was granted. [LF 7] The trial court took up Mother=s MOTION TO VACATE, SET ASIDE, REOPEN AND AMEND JUDGMENT; OR, GRANT NEW TRIAL on March 1, 2004, and overruled the same. [LF 100] NOTICE OF APPEAL was filed by Mother on March 9, 2004. [LF 101]

POINTS RELIED ON

I

The Trial Court lacked subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act because:

A. At the time jurisdiction was assumed, there was no other custody proceeding pending in another State, therefore, no other court had declined jurisdiction based upon the required finding that Missouri was a more appropriate forum; and,

B. It was not in the best interest of the child that Missouri assume subject matter jurisdiction

A. State ex rel. Rashid v. Drumm, 824 S.W.2d 497 (Mo. App. E.D. 1992)

State ex rel. Laws v. Higgins, 734 S.W.2d 274 (Mo. App. S.D. 1997)

Elbert v. Elbert, 833 S.W.2d 884 (Mo. App. E.D. 1992)

Haydon v. Darrough, 961 S.W.2d 940 (Mo. App. E.D. 1998)

'452.450 R.S.Mo.

'452.410 R.S.Mo.

'452.450.1(1) (2) (3) R.S.Mo.

'452.450.1(4) R.S.Mo.

2. In re marriage of Dooley, 15 S.W.3d 747 (Mo. App. S.D. 2000)

Bounds v. O=Brien, 2004 WL 502981 (Mo. App. E.D. 2004)

Piedimonte v. Nissen 817 S.W.2d 260 (Mo. App. W.D. 1991)

'452.450.1(4) R.S.Mo.

ARGUMENT

I

The Trial Court lacked subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act because:

A. At the time jurisdiction was assumed, there was no other custody proceeding pending in another State, therefore, no other court had declined jurisdiction based upon the required finding that Missouri was a more appropriate forum;

The burden of establishing a prima facie basis of jurisdiction is on the proponent of that jurisdiction. State ex rel. Rashid v. Drumm, 824 S.W.2d 497, 505 (Mo. App. E.D. 1992). There is no presumption that subject matter jurisdiction exists. State ex rel Laws v. Higgins, 734 S.W.2d 274, 277 (Mo. App. S.D. 1997). Subject matter jurisdiction may be raised at any time, may not be waived, and though not raised by a party, subject matter jurisdiction may be examined by the Appellate Court. Elbert v. Elbert, 833 S.W.2d 884, 887 (Mo. App. E.D. 1992). In the case at hand, Father had the burden of establishing that the Circuit Court of Cape Girardeau County, had subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act under ' 452.450 R.S.Mo. In order to make his prima facie case, Father must introduce sufficient evidence to establish that the requirements of '452.450 R.S.Mo. had been met. In that regard, the record lacks any evidence upon which the trial court could find that it had subject matter jurisdiction.

The Circuit Court of Cape Girardeau County, Missouri, does not have automatic and continuing jurisdiction just because It had issued the original divorce decree and modification orders regarding

visitation. This point was addressed in Haydon vs. Darrough, 962 S.W.2d 940 (Mo. App. E.D. 1998). The Court in Haydon held:

> "A court may not modify a prior custody decree unless it has jurisdiction under the provisions of Sections 452.450 and 452.410." Haydon at 942.

Based on the logic of Haydon, subject matter jurisdiction would have to be established for each and every motion brought before the trial court which seeks to modify previous custody or visitation orders.

Since the Mother and child moved to the State of Arizona in October of 1996, Missouri was no longer the "home state" of the minor child. Because Mother and child have resided continuously in the State of Arizona for the last eight years, neither has a significant connection with the State of Missouri. Father has been stationed all over the country and is now stationed in Italy. Father has not lived in the State of Missouri for several years. He no longer has a significant connection with the State of Missouri. The child was not present in the State when the trial court assumed jurisdiction, and there was no evidence to establish an emergency situation necessary to protect the child from neglect or abuse. These facts in the record prove that the trial court did not have subject matter jurisdiction under '452.450.1(1)(2)(3) R.S.Mo.

Section 452.450.1(4) R.S.Mo. is often referred to as the "default or vacuum" provision of the Uniform Child Custody Jurisdiction Act. In order to establish jurisdiction under this part of the Act, Father must prove the following:

1. Another State has declined to exercise jurisdiction; and,

2. Said State declined jurisdiction on the grounds that Missouri is the more appropriate forum to determine the custody of the child; and,

3. It is in the best interest of the child that this Court assume jurisdiction.

Failure to prove any one of these three elements effectively deprives the trial court of subject matter jurisdiction.

A trial court=s acquisition of jurisdiction over a case depends on the facts existing at the time its jurisdiction is invoked. Laws at 278. There is nothing in the Act which would indicate that jurisdiction requirements may be established during the pendency, as opposed to the commencement of the proceedings. Laws at 278. Therefore, it would follow that subject matter jurisdiction should be determined on the date a case is filed and/or summons is issued. Facts or events occurring after commencement of the case are not relevant for purposes of determining subject matter jurisdiction.

The Father, Adrian Meyer, filed his MOTION TO MODIFY CUSTODY on October 23, 2003. Shortly thereafter, a summons was issued. The Mother, Melissa Pirisky, was personally served on November 10, 2003. At that point in time, there were no other custody proceedings pending in a court of this State or in the State of Arizona. Therefore, if no other custody proceedings were pending in the State of Arizona, then it cannot be said that "another State has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child". The decline of jurisdiction by another State on this specific ground is a pre-requisite to the exercise of jurisdiction under '452.450.1(4) R.S.Mo. If Father cannot establish that another court declined jurisdiction, and that the declining court found Missouri to be a more appropriate forum, then his case must fail. Since no Arizona

action was even pending when this case was commenced, then no Arizona court was in a position to decline jurisdiction. Consequently, Father has failed to satisfy the requirements of '452.450.1(4) R.S.Mo.

On December 8, 2003, well after commencement of this action, and after assumption of jurisdiction by the Circuit Court of Cape Girardeau County, Missouri, Mother filed a motion in the State Court of Arizona. Mother=s motion asked that the State Court of Arizona assume jurisdiction over the child. On December 10, 2003, the Superior Court of the State of Arizona, County of Pima, declined to exercise jurisdiction, presumably because the State of Missouri had already assumed jurisdiction. The Arizona Court did not make any specific findings. In particular, there was no finding by the Arizona court that jurisdiction was declined "on the ground that this State (Missouri) is the more appropriate forum to determine the custody of the child". This specific finding, which was absent from the Arizona Court Order, is a requirement of '452.450.1(4) R.S. Mo.

Even though the Arizona court declined jurisdiction after the commencement of this present Missouri action, Father cannot depend on facts occurring during the pendency of this case to establish subject matter jurisdiction. If a Missouri court improperly assumes subject matter jurisdiction over a child, then States which would, in fact, have jurisdiction will be discouraged from assuming jurisdiction over a child. This would lead to a tug-of-war between two separate States. This situation is exactly what the Uniform Child Custody Jurisdiction Act was designed to avoid. A Missouri court which improperly assumes jurisdiction should not be rewarded by discouraging a more appropriate State from assuming jurisdiction. Therefore, events which occur after commencement of a custody proceeding should not be considered in determining subject matter jurisdiction.

B. It was not in the best interest of the child that Missouri assume subject matter jurisdiction

In addition to all other requirements of ' 452.450.1(4) R.S.Mo., the Father must also establish that it is in the best interest of the child for a Cape Girardeau County, Missouri, court to assume jurisdiction. The determination of the "best interest of the child" under ' 452.450.1(4) R.S.Mo., refers to a choice of forum, not to the fitness of the parents. If there is no other forum which can and will adjudicate custody, then the best interest of the child is served by a custody determination in the forum where the child is physically present. See Rashid at 503. "The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state." In re marriage of Dooley, 15 S.W.3d 747, 757 (Mo. App. S.D. 2000). In Dooley, the Court found that subject matter jurisdiction was lacking because the Mother failed to establish "maximum rather than minimum contact with the State". Mrs. Dooley failed to present any evidence indicating that the child=s "present or future care, protection, training and personal relationships were located within the State of Missouri". Dooley at 758. As a result, the trial court=s judgment was reversed based upon a lack of subject matter jurisdiction over child custody and support.

In the instant case, the minor child had not resided in the State of Missouri for nearly eight years. All of the evidence pertaining to the child=s current schooling, home environment, present family environment and social activities is located in the State of Arizona. All of the evidence involving his present and past care is located in the State of Arizona. None of the evidence concerning the child=s future care, training or education is located in the State of Missouri. The Mother continues to live in Arizona and has no intention

of returning to Missouri. The Father, has not lived in the State of Missouri for many years. He had been stationed at various Air Force bases throughout the United States, including Georgia, Nevada, Texas and Alabama. For the two years immediately preceding this action, Father had been stationed in Italy. Father intends to return to Italy with the child. Therefore, if custody were granted to Father, evidence of the child=s future care, protection, training and personal relationships would be located in Italy. There was no evidence that Father was planning to return to the State of Missouri and take up residence. The Missouri court did not have optimum access to information which would bear directly on the best interest of the child.

In Bounds v. O=Brien, 2004 WL 502981(Mo. App. E.D. 2004), the Court held:

> "It has been observed that it is implicit in the scheme of the UCCJA that the trial court should make an initial determination of jurisdiction by express findings of fact before proceeding to the substantive issue of custody. Piedimonte v. Nissen 817 S.W.2d 260, 266 (Mo. App. W.D. 1991). Thus, a ruling of jurisdiction by a court that is merely conclusory or that assumes jurisdiction but is tacit as to the factual basis for that adjudication, does not meet the objectives of the Act." See Bounds at 3.

In the case at hand, the JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION entered on January 29, 2004, lacks sufficient evidence and findings of fact to establish subject matter jurisdiction. There are no findings in the trial court=s Order related to the best interest of the child as it relates to selection of a forum. Furthermore, there was no evidence presented at the hearing on January 6, 2004, which would support the trial court=s exercise of jurisdiction under ' 452.450.1(4) R.S.Mo. Father failed to establish that evidence concerning the child=s past, present or future care would be available in the State of Missouri. There was no inquiry by the trial court regarding subject matter jurisdiction at all. There

was no evidence presented, and there is no record that the trial court even considered factors establishing subject matter jurisdiction.

In fact, the evidence presented by Father should have alerted the trial court to problems regarding subject matter jurisdiction. Father testified that the Mother and child had resided in Arizona for nearly eight years. Additionally, he testified that he would be taking the child to Italy. This evidence presented by Father demonstrated that information about the child=s past and present care is located in the State of Arizona. Evidence of the child=s future care would have been in Italy.

Given this testimony, the trial court should have concluded that no evidence of the child=s past, present or future care existed in the State of Missouri.

SUMMARY

When this action was commenced, no other cases were pending in the State of Arizona. The State of Arizona had not yet declined jurisdiction. Once the Arizona court chose not to assume jurisdiction, its order did not contain a specific finding that "Missouri was the more appropriate forum to determine the custody of the child". Therefore, the first requirement of ' 452.450.1(4) R.S.Mo. has not been met.

No evidence was presented that Missouri was the forum best suited to serve the child=s interest. The parents and child had no contact with the State of Missouri. None of the evidence relevant to the child=s past, present or future custody was available in the State of Missouri.

The purpose of the Uniform Child Custody Jurisdiction Act is to have custody determinations made in States that have optimum access to relevant evidence bearing on the best interest of the child. The transfer of custody from one parent to another, after ten years, is a drastic step and can only be based on a "substantial and continuing change in circumstances between the child and his custodian." All of the evidence pertaining to the relationship between Brett Alexander Meyer and his Mother is located in the State of Arizona. Therefore, the Arizona court had optimum access to evidence bearing on the "substantial and continuing changing circumstances" which would justify a transfer of custody.

POINTS RELIED ON

II

The trial court abused Its discretion by refusing to vacate, set aside, or reopen Its JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION because Mother demonstrated "good cause" and "excusable neglect".

Rule 75.01

Klaus v. Shelby, 4 S.W.3d 635 (Mo. App. E.D. 1999)

Brueggemann v. Elbert, 948 S.W.2d 212 (Mo. App. E.D. 1997)

B L C (K) v. W W C, 568 S.W.2d 602 (Mo. App. K.C.D. 1978)

Rule 78.01

Rule 74.06(b)

Gibson v. White, 904 S.W.2d 22 (Mo. App. W.D. 1995)

Preferred Laser Services, Inc. v. Abate, 117 S.W.3d 678 (Mo. App. E.D. 2003)

Willis v. Placke, 903 S.W.2d 219 (Mo. App. E.D. 1995)

Jones v. St. Joseph and G. I. RY. CO., 183 Mo. App. 231 170 S.W. 425 (K.C. 1914)

ARGUMENT

II

The trial court abused Its discretion by refusing to vacate, set aside, or reopen Its JUDGMENT AND ORDER MODIFYING DECREE OF DISSOLUTION because Mother demonstrated "good cause" and "excusable neglect".

Pursuant to Supreme Court Rule 75.01, the trial court retains jurisdiction over judgments for a thirty-day period after entry of said judgment. If an authorized after-trial motion is filed, then the trial court=s control over the judgment is extended to ninety days from the date the motion is filed. Klaus v. Shelby, 4 S.W.3d 635, 637 (Mo. App. E.D. 1999).

Supreme Court Rule 75.01, provides the "least stringent standard" for setting aside a judgment because it inheres while the trial court retains jurisdiction of the case. Brueggemann v. Elbert, 948 S.W.2d 212, 214 (Mo. App. E.D. 1997). In order to obtain relief pursuant to Supreme Court Rule 75.01, a party need only show "good cause" and is not required to establish a meritorious defense or "excusable neglect". Thereafter the trial court may vacate, reopen, correct, amend or modify its judgment. Brueggemann at 214.

"Good cause" encompasses the occurrence of mistakes or conduct that is not intentionally or recklessly designed to impede the judicial process. Brueggemann at 214. In Brueggemann, a local attorney failed to appear for a scheduled hearing date. The trial court entered judgment against his client. A motion to set aside the judgment was filed within thirty days as provided by Supreme Court Rule 75.01. The trial court denied the motion and refused the set aside its judgment. On appeal, the trial court=s ruling was reversed and remanded.

The court in Brueggemann acknowledged that the decision to set aside judgment is a matter within

the trial court=s discretion. However, "the discretion not to set aside a judgment is a good deal narrower than the discretion to set it aside." Brueggemann at 214. Brueggemann went on to define "good cause" as follows:

> "The term >good cause=, as used in this connection, is not susceptible of precise definition, but it was obviously coined to serve a remedial purpose in a matter addressed primarily to the conscience of the court and it should therefore be interpreted with commensurate liberality, not only to prevent a manifest injustice, but to avoid a threatened one especially in cases tried without a jury where evidence on one side only is presented." Brueggemann at 214.

When considering whether a particular set of circumstances falls within the "good cause" definition, a trial court should give the most broad and liberal meaning to that set of circumstances. The Brueggemann court indicated that even more flexibility should be extended in cases tried without a jury where evidence on one side only is presented.

Cases involving the custody and visitation rights of children are the most important before any court. When making such a decision, it is difficult for the trial court to render a judgment in many instances, even if it hears evidence from both sides in a lengthy adversarial hearing. In B L C (K) v. W W C, 568 S.W.2d 602 (Mo. App. K.C.D. 1978), the Appellate Court upheld a trial court=s ruling to reopen and set aside a judgment on a father=s motion to modify. In ruling, the Appellate Court stated:

> "In circumstances when a court has the solemn duty to decide the custody of a child, it serves the ends of justice for a tribunal beset by doubt out as to the true evidence as in this case to reopen the proceedings for independent proof and further opportunity to the parties for testimony." B L C (K) at 604-605.

The court in B L C (K) noted that the effect of an order to set aside would only restore control of the proceedings to the trial court for further evidence. By setting aside its original judgment and taking additional evidence, the trial court is in a better position to make a more informed award of custody. This alone, was "good cause" to vacate and set aside the order and restore full proceedings to the trial court.

Supreme Court Rule 78.01, allows the trial court to grant a new trial of any issue upon "good cause" shown. Furthermore, on a motion for a new trial in an action tried without a jury, the trial court may open the judgment, take additional testimony, amend findings of fact or make new findings, and direct the entry of a new judgment. Supreme Court Rule 78.01, does not require any showing of meritorious defense or excusable neglect. A mere showing of "good cause" is sufficient to obtain relief under the Rule.

In the case at hand, Mother demonstrated "good cause". She was only given eleven days notice to travel from Arizona to Missouri for a hearing involving the custody of her child. On such short notice, Mother could not gather the financial resources and travel to Missouri for the hearing. Additionally, she was not allowed time off from her employment to make this court appearance. As indicated in her correspondence to the trial court, Mother made it clear that she would be able to appear and defend this action if given additional time.

Mother was quite vigilant in communicating with the trial court. There were at least three written communications in the file asking for more time and explaining her situation to the trial court. Under the circumstances, Mother did everything in her power to deal with this pending motion.

The nature of the motion filed by Father was to determine the best interest of the child. The trial court=s decision should be based on information available to it from all sides in the case. It is logical that a court with more information can make a more informed decision. The Appellate Court in B L C (K)

suggested that the trial court should take a more liberal view when setting aside judgments in custody matters. Under these circumstances, the trial court should have erred on the side of taking additional evidence. Also, as pointed out in Brueggemann, this case was tried without a jury and where evidence from only one party was presented. This, too, would suggest that the trial court should take a broader view and more considerate approach when applying the definition of "good cause" to Mother=s circumstances.

Because of circumstances unknown to the parties, the trial court did not rule on Mother=s request for a continuance in a prompt manner. Mother requested an extension of time to deal with this matter on December 8, 2003. Directing your attention to page 82, of the Legal File, the court clerk made a hand-written note to the trial judge indicating that Mother had called several times inquiring about the status of her REQUEST FOR EXTENSION OF TIME. The trial court did not rule on this motion until December 17, 2003. This delay aggravated the short time constraints placed on Mother in dealing with this case. A copy of the trial judge=s denial of Mother=s MOTION FOR EXTENSION OF TIME was not mailed out until December 19, 2003.

The vacating or setting aside of the trial court=s order would only restore control of the proceedings to the trial court for further evidence. No party would have been prejudiced by setting aside this order. After hearing all of the evidence from both sides, the trial court is in no worse position to make its ruling on the transfer of custody. The parties would only have been restored to their original position prior to the uncontested hearing of January 6, 2004.

Supreme Court Rule 74.06(b) allows the trial court to relieve a party of a final judgment or order upon a showing of "excusable neglect". "Excusable neglect" is defined as:

> "Failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party." Gibson v. White, 904 S.W.2d 22, 25 (Mo. App. W.D. 1995)

Each case of "excusable neglect" should be considered on its own facts. Preferred Laser Services, Inc. v. Abate, 117 S.W.3d 678, 680 (Mo. App. E.D. 2003). In discussing "excusable neglect", the Eastern District Court of Appeals in Willis v. Placke, 903 S.W.2d 219 (Mo. App. E.D. 1995) stated:

> "[4] In addition, it has been stated that in order for a party to obtain relief pursuant to a motion to set aside, that party must show his neglect of the case occurred through no fault of his own. Jones v. St. Joseph and G. I. RY. CO., 183 Mo. App. 231 170 S.W. 425, 426 (K.C. 1914). The party seeking relief must establish 'he exercised such diligence as an ordinarily reasonable man would have exercised under the same or similar circumstances.'" Willis at 221.

Given the totality of circumstances in the case at hand, Mother clearly demonstrated "excusable neglect". She lacked the necessary resources and ability to travel across the country on just eleven days notice. This may not have been such a critical time crunch if she resided in the State of Missouri. However, given the fact that she resided in Arizona, this short notice of the hearing is a significant factor that the trial court should have considered when ruling on her motion. If this matter had been set for hearing with thirty or forty-five days advance notice, then the trial court would have been justified in giving less weight to this argument.

Additionally, Mother was diligent in contacting the trial court on several occasions and requesting additional time. Unfortunately, her MOTION FOR EXTENSION OF TIME was not immediately ruled on. She made a second request asking for additional time. According to comments made by the trial court

in the hearing transcript, this second request was received by the trial court on January 5, 2004. Furthermore, the trial court announced that it had not ruled on this request and did not notify Mother that the request would be denied. Consequently, the trial court went forward with a hearing and did not notify Mother that this second request was denied.

SUMMARY

Mother=s failure to appear and defend the motion filed by Father on January 6, 2004, was due to circumstances beyond her control. On such short notice, she could not litigate her case by deposition. Furthermore, her inability to travel and lack of resources on such short notice was an "unavoidable hindrance" which prohibited her from litigating her case. Mother did everything within her power to notify the trial court of her situation. Most parties in a lawsuit would stick their head in the sand and try to ignore the action pending against them. However, Mother was quite diligent in communicating with the trial court and explaining her current circumstances. The trial court=s refusal to set aside this judgment was against the logic of the circumstances presented.

CONCLUSION

Although Mother=s two points of appeal are discussed and argued separately in this brief, they are linked by practicality and law. Father=s action should have been filed in the State of Arizona which under the Uniform Child Custody Jurisdiction Act, would have been the appropriate forum. If the case had been filed in Arizona, then Mother would have no excuse for her failure to appear and defend this action. Her limited resources and travel time would not have come into play. Both sides would have been available to present evidence on this very important issue of child custody. Consequently, having heard evidence from all sides, the trial court would be better informed in issuing its judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT with disc was mailed, postage paid, this day of , 2004, to Diane Howard, attorney for Respondent, P.O. Box 1150, Cape Girardeau, MO 63702-1150

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